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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 178

DAVIS FROZEN FOODS, INC., *Petitioner*

v.

NORFOLK SOUTHERN RAILWAY COMPANY, *Respondent*

PETITION AND BRIEF FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MURRAY ALLEN
ARCHIBALD CRAIGE
FRANKLIN T. DUPREE, JR.
Counsel for Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

Subject Index.

	Page
Introductory Prayer	1
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	2
Statement of the Case	2
Specification of Errors	7
Reasons for Granting the Writ	8
Conclusion	19
Appendix "A"—Opinion Below	20
Appendix "B"	23

Table of Cases Cited.

Angel v. *Bullington*, 330 U.S. 183, 67 S. Ct. 657, 91 L. Ed. 832 ..... 12, 18
Angelo v. *Lamborn*, 2 F. 2d 855 15
Arnold v. *Trust Co.*, 48 N.C. 433, 67 A. D. 250 9
Bank & School Com., 121 N.C. 107, 28 S.E. 134 10
Cable v. *R. R.*, 122 N.C. 892, 29 S. E. 377 10
Caldwell v. *Wilson*, 121 N.C. 425, 28 S.E. 554 10
Capital Traction Co. v. *Hof*, 174 U.S. 1 ..... 13, 14
Cities Serv. Oil Co. v. *Dunlap*, 308 U.S. 208, 84 L. Ed. 196, 60 S. Ct. 201 ..... 12, 18
Clay County Cotton v. *Home Life Ins. Co.*, 113 F. 2d 856 17
Cohen v. *Beneficial Loan Corp.*, 337 U.S. 541, 69 S. Ct. 122 ..... 12, 18
Collins v. *Swanson*, 121 N.C. 67, 28 S.E. 65 10
Cooper v. *Brown*, 126 F. 2d 874 17
Cox v. *R. R.*, 123 N. C. 604, 31 S. E. 848 9
County of Macon v. *Shores*, 97 U.S. 272 15

Page

Detroit Edison Co. v. *Knowles*, 152 F. 2d 422..... 17
Eller v. *Church*, 121 N.C. 269, 28 S.E. 364 10
Erie R. Co. v. *Tompkins*, 304 U.S. 64, L. Ed. 1188, 58 S. Ct. 817 .....7, 11, 13, 14, 16, 18, 19
Evans v. *Ins. Co.*, 213 N.C. 539, 196 S.E. 814 9
Everett v. *Receivers*, 121 N.C. 519, 27 S.E. 991..... 10
Fisher v. *Jackson*, 216 N.C. 302, 4 S.E. 2d 847 9
Gorham v. *Mutual Ben. Health & Accident Ass'n of Omaha*, 144 F. 2d 97, cert. denied, 312 U.S. 688..... 16
Guaranty Trust Co. v. *York*, 326 U.S. 99, 89 L. Ed. 2079, 65 S. Ct. 1464, 160 ALR 1231.....12, 16, 18
Gulf, Mobile & Ohio R. Co. v. *Williamson*, 191 F. 2d 887 17
Gunning v. *Cooley*, 281 U.S. 90 15
Hardison v. *R.R.*, 120 N.C. 492, 26 S.E. 630 10
Haywood v. *Insurance Co.*, 218 N. C. 736, 12 S.E. 221 9
Herron v. *So. Pac. R. Co.*, 283 U.S. 91, 51 S. Ct. 383, 75 L. Ed. 857 .....13, 14, 17
House v. *R.R.*, 131 N.C. 103, 42 S.E. 533 9
In Re Will of Margaret Deyton, 177 N.C. 494, 99 S.E. 424 15
Johnson v. *R. R.*, 122 N.C. 955, 30 S.E. 127 10
Klaxton Co. v. *Stentor Elec. Co.*, 313 U.S. 487, 85 L. Ed. 1481, 61 S. Ct. 1023, 134 ALR 1462 .....12, 18
Laxton v. *Hatzel & Buehler, Inc.*, 142 F. 2d 913 17
Lennig v. *New York Life Ins. Co.*, 122 F. 2d 87..... 17
Lyon v. *Travelers Assn.*, 25 F. 2d 596 16
Marshall v. *Hubbard*, 117 U.S. 415 15
McCracken v. *Clark*, 235 N.C. 186, 69 S.E. 2d 184 7, 8, 17, 19
McSweeney v. *Prudential Ins. Co.*, 128 F. 2d 660, Cert. Denied, 317 U.S. 658 17
N. Jacobi Hardware Co. v. *Victor*, 11 F. 2d 30..... 16
Norfolk Southern Ry. Co. v. *Davis Frozen Foods, Inc.*, 4 Cir. 195 F. 2d 662 ..... 2, 4
North Penn R. Co. v. *Com. Nat. Bank*, 123 U.S. 727 15
Nudd v. *Barrows*, 91 U.S. 426 .....13, 14
Palmer v. *Hoffman*, 318 U.S. 109, 117 L. Ed. 645, 63 S. Ct. 477, 144 ALR 719 .....12, 18
Ragan v. *Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 93 L. Ed. 1520, 69 S. Ct. 1233 18
Slocum v. *N. Y. Life Ins. Co.*, 228 U.S. 364 15
Spence v. *Bethlehem Steel Co.*, 173 Md. 539, 197 A. 302 19

Page

Spruill v. *Ins. Co.*, 120 N.C. 141, 27 S.E. 39 ..... 9, 10
Stoner v. *New York L. Ins. Co.*, 311 U.S. 464, 85 L. Ed. 284, 61 S. Ct. 336 ..... 12, 17
Swift v. *Tyson*, 16 Pet. 1, 18 L. Ed. 865 ..... 11, 14
United States v. *Grannis*, 172 F. 2d 507 16
Waldron v. *Aetna Cas. & Sur. Co.*, 141 F. 2d 230 17
West v. *American Tel. & Tel. Co.*, 311 U.S. 223, 61 S. Ct. 179, 85 L. Ed. 139 ..... 11, 12
Whitley v. *R. R.*, 122 N.C. 987, 29 S.E. 783 10
White v. *State of Md.*, 106 F. 2d 392 17
White v. *R. R.*, 121 N.C. 484, 27 S.E. 1002 10
Whitten v. *City of Haverhill*, 204 Mass. 95, 90 N.E. 409 19
Wittkowski v. *Wasson*, 71 N.C. 451 9
Woods v. *Interstate Realty Co.*, 337 U.S. 535, 69 S. Ct. 1235, 93 L. Ed. 1524 ..... 12, 18
Yarn Mills v. *Armstrong*, 191 N.C. 125, 131 S.E. 416 9

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No.

DAVIS FROZEN FOODS, INC., *Petitioner*

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NORFOLK SOUTHERN RAILWAY COMPANY, *Respondent*

PETITION AND BRIEF FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Davis Frozen Foods, Inc., a North Carolina corporation, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above entitled case on May 28, 1953.

OPINIONS BELOW

The District Judge did not render an opinion in either the first or second trial. The first opinion of the United States Court of Appeals for the Fourth Circuit filed April 1, 1952 is reported in *Norfolk Southern Ry. Co.* v. *Davis*

Frozen Foods, Inc., 4 Cir. 195 F. 2d 662, ~~in the record at page ——~~. The second opinion of the Court of Appeals for the Fourth Circuit was entered May 28, 1953, —F. 2d—, and is in the record page 2-14, and is made Appendix A to this petition.

JURISDICTION

The judgment of the United States Court of Appeals, Fourth Circuit, was entered on May 28, 1953. The jurisdiction of this Honorable Court is invoked under New Title 28, United States Code, Judiciary and Judicial Procedure, Sections 1254, 1332 and 2101, together with Rule 38, Section 5 (b) of this Court.

QUESTION PRESENTED

Whether, in a diversity of citizenship case tried in North Carolina, the decision of the Court of Appeals, in affirming a directed verdict in favor of the plaintiff who had the burden of proof, which is strictly forbidden by the law of the State of North Carolina, creates a discrimination against citizens of the State in favor of those authorized to invoke the diversity jurisdiction of Federal Courts, which discrimination is contrary to the decisions of the United States Supreme Court.

STATUTES INVOLVED

There are no State statutes involved, but the pertinent law is firmly decided by the highest Court of the State of North Carolina that a directed verdict in *favor* of the party having the burden of proof is forbidden. This is fully set forth under the section, Reason for Granting the Writ, of this petition.

STATEMENT OF THE CASE

This is a civil action for property damages which was first tried in the United States District Court for the Eastern District in the State of North Carolina at the September Term, 1951. Jurisdiction was based solely on diversity

of citizenship, the allegations of section 1 of the Norfolk Southern Railway Company's complaint, herein the respondent, being as follows:

> "1. That the plaintiff is a citizen of the State of Virginia, being a corporation incorporated under the laws of the State of Virginia. That the defendant, as the plaintiff is informed and believes, is a citizen of the State of North Carolina, being a corporation incorporated under the laws of the State of North Carolina. That the matter in controversy, exclusive of interest and costs, exceeds the sum of THREE THOUSAND ($3,000.00)." (Certified typewritten record, p. 2.)

The allegations of section 1 were admitted in defendant petitioners' answer. (Certified typewritten record, p. 5). The allegation of the complaint which is the basis of plaintiff's claim for damages, is as follows:

> "2. That on July 30, 1947, the defendant negligently drove a large and heavy motor truck along North Carolina Highway No. 581 near the town of Bailey, N. C., and into violent collision against the overpass bridge carrying the railroad track of this plaintiff over the said highway, and the defendant thereby caused such injury and damage to the said structure as to dislocate the same and the track thereon to such an extent and in such manner that, shortly thereafter, plaintiff's train, which was being properly operated along said track and was proceeding thereon and over the said structure, was by defendant's said negligence directly and proximately caused to be derailed and great injury and damage was done thereto, as will hereinafter more fully appear." (R. 1)[1]

This allegation was denied by defendant, Davis Frozen Foods, Inc., herein the petitioner, in its answer. (R. 2.)

In its further answer and defense, the defendant pleaded contributory negligence on the part of the plaintiff in that

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[1] References are to Printed Transcript of Record (Appendix to Brief of Appellant) United States Court of Appeals.

said overpass bridge was negligently constructed and maintained, and that the plaintiff negligently failed to mark the overhead clearance and negligently failed to provide any warning to travelers approaching said overpass bridge on North Carolina Highway No. 581.

On the first trial of this case, the jury returned a verdict in favor of the defendant by answering the first issue as to negligence, which read: "Was the damage sustained by the plaintiff caused by the negligence of the defendant?" in the negative. Motion by plaintiff to set aside the verdict, supported by oral argument, was denied. (Original judgment, U. S. District Court, November 1, 1951, certified typewritten record, p. 39).

Plaintiff appealed and the United States Court of Appeals, Fourth Circuit, reversed the judgment and remanded the case for a new trial. *Norfolk Southern Railway Company* v. *Davis Frozen Foods, Inc.*, C.A. (4 Cir.), 195 F. 2d 662, stating the following at page 664:

> "The questions really before us are (1) whether it was error to refuse to direct a verdict on the first issue as interpreted by the judge's charge, (2) whether it was error to submit the second and third issues, and (3) whether evidence as to warning signs placed at other underpasses beneath plaintiff's tracks was properly admitted.
>
> On the first question we think that there was error in not directing a verdict for the plaintiff upon the first issue, as we are of the opinion that the evidence so clearly established that the dislocation of the tracks was due to negligence on the part of the driver of the truck that reasonable men could entertain no doubt about the matter."

This petitioner then submitted a petition to rehear, citing as error the holding that the Trial Court should have directed a verdict for the plaintiff on the first issue. Petition was denied by the United States Court of Appeals. (R.)

On the second trial, the District Court directed the jury to answer the first issue, which was the same as in the first trial, "Yes" in favor of the plaintiff (R. 127-128), which the jury did. The jury then answered all other issues in favor of the plaintiff, awarding damages in the amount of $26,250.00. (R. 152.)

The facts are as follows :

The main line of plaintiff runs approximately east and west through the town of Bailey, within which Highway No. 581 passes under the main line of plaintiff by means of an underpass. The bridge which carried the main line of plaintiff over the highway was maintained by plaintiff. The vertical clearance from the top of the highway to the underneath part of the railroad bridge was 9.1 feet. The horizontal clearance was 17.9 feet. (R. 3-4.)

On July 30, 1947, the defendant's truck was traveling northwardly on Highway No. 581 at the speed of 15 m.p.h., having just made a right angle turn with Highway No. 581, some 250 feet from the underpass. The direction traveled by the defendant's driver was slightly down grade. Just before reaching the underpass, the driver realized that the truck couldn't get under and applied his brakes and just before coming to a complete stop, the top of his truck struck a steel I beam of the trestle. The height of the truck was 9½ feet. No injury was sustained by the driver, who got out on the running board of his truck in order to look up at the railroad trestle to observe any damage that might have been caused, and seeing nothing wrong, he backed away and came on to Raleigh. (R. 111-112.)

The top of the truck struck the lowest part of a steel I beam which was 18 inches in height and 22 feet in length, weighed approximately 2,040 pounds, and was placed along side of and secured to two other identical I beams, forming a cluster of three I beams on one side of underpass, and the same for the other side. (R. 51-52.)

There were no warning signs of any kind placed on or about the trestle by the plaintiff which would caution users

of the highway of the dangers of the low underpass. (R. 56, 126.)

The legal limit of the height for trucks in North Carolina is 12½ feet. North Carolina General Statutes, 1943, Vol. 1, Section 20-116(c). (Appendix B of this petition.)

There was a State Highway Department sign some distance from the underpass on the right side of the road, which was obscured by weeds, and which read "Narrow Underpass, Clearance 8½ feet". (R. 73, 74, 75.)

The entire underpass had been re-built just three weeks before by the plaintiff, (R. 55), in such a way that the superstructure was all one unit so that if one part was moved, the other part would move. (R. 52.)

Shortly after the defendant's truck had left, *but before the train wreck,* two disinterested witnesses, responsible citizens of the town of Bailey, walked down to the underpass for the express purpose of seeing if any damage had been done to the trestle. Going underneath the underpass, and looking directly up at the steel beams, they were unable to detect anything wrong with the bridge or I beams, and so left without making any report to the plaintiff's station agent at Bailey. (R. 47, 48, 87, 88.) This was in sharp conflict with the plaintiff's witness, General Superintendent Kennedy, who testified on cross-examination that a man of reasonable judgment about bridge construction should have been able to detect the alleged displacement caused by the truck by walking under the trestle and looking up, *before the train wreck.* (R. 60-61.) Kennedy did not view the scene until *after* the train wreck, (R. 58.) which had materially damaged the trestle. (R. 53.)

The testimony of the two disinterested witnesses mentioned in the preceding paragraph, and that of the defendant's truck driver, that there was no damage done to the trestle, was in sharp contradiction of testimony of plaintiff's brakeman. About an hour afterward, one of plaintiff's trains, traveling westwardly, derailed at or about the underpass. The brakeman in the engine cab first noticed from about 400 feet that the *trestle* or *bridge* was out of

line two feet. (R. 17, 25.) Plaintiff contended and offered evidence tending to show that the brakes were immediately applied and everything possible was done to stop the train, without success.

The respondent defendant appealed, citing as error among other things, the directed instruction by the District Judge on the first issue, which was clearly contrary to the decisions of the Supreme Court of North Carolina which prohibit a directed verdict in favor of the party having the burden of proof.

The United States Court of Appeals affirmed the judgment of the District Court on May 28, 1953.

SPECIFICATION OF ERRORS TO BE URGED

The United States Court of Appeals erred:

1. In refusing to apply the law of the State of North Carolina, as repeatedly decided by its highest Court, which holds that a directed instruction in favor of the party having the burden of proof is forbidden. *McCracken* v. *Clark* (1952) 235 N.C. 186, 69 S.E. 2d 184,

2. In holding that the question is one of Federal and not State practice, which is clearly contradictory to the decision of *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, and other recent decisions of this Court, as well as those of the various Courts of Appeal,

3. In discriminating against citizens of the State of North Carolina in favor of those authorized to invoke the diversity jurisdiction of Federal Courts,

4. In affirming the judgment of the District Court.[2]

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[2] Other errors to be urged should certiorari be granted concern:

A. The invasion of the province of the jury by the District Court and the United States Court of Appeals on such matters involving actionable negligence, conflicting evidence, foreseeability, and credibility of witnesses. The laws of the State of North Carolina declare these matters to be for the jury.

REASONS FOR GRANTING WRIT

The theory of the plaintiff's case throughout has been that defendant's truck violently struck the underneath part of the plaintiff's overhead train trestle with such force that it dislocated the bridge thereby causing a train wreck about an hour later. The petitioning defendant not only denied this, but developed the plaintiff's evidence and offered its own to prove that it did no damage to the trestle, and showed that under the circumstances of the situation, there was no negligence on the part of the defendant's driver in striking the low, unmarked bridge over the highway. The jury of twelve reasonable men in the first case in the United States District Court of North Carolina believed this, and found for the petitioning defendant. Upon a new trial granted by the Court of Appeals, the District Court was virtually ordered to instruct the jury to find for the plaintiff on the first issue, which read as follows: "Was the damage sustained by the plaintiff caused by the negligence of the defendant?" The District Court instructed the jury to find for the plaintiff on the first issue. (R. 127-128.) Petitioning defendant excepted to this instruction, the jury returned a verdict of $26,250 in favor of the plaintiff, and the United States Court of Appeals for the Fourth Circuit affirmed the District Court.

This petitioner contends that it was error to instruct the jury in favor of the plaintiff on the first issue, the plaintiff having the burden of proof. This is error because it is clearly contrary to the decision of the highest Court of the State of North Carolina. The most recent expression of this local law is found in *McCracken* v. *Clark,* (1952) 235 N.C. 186, 69 S.E. 2d 184, which states in clear and unequivocal terms:

B. A mis-interpretation of the trial judges' charge to the jury on the first issue in the first trial and erroneous interpretation of evidence adduced at the second trial by The Court of Appeals.

"It is established by many authoritative decisions in this Court that a directed instruction in favor of the party having the burden of proof is forbidden. *Haywood* v. *Ins. Co.*, 218 N.C. 736, 12 S.E. 221, and cases cited."

In *Haywood* v. *Ins. Co.*, (1940) 218 N.C. 736, 12 S.E. 221, the Court held:

"A familiar principle of practice forbids a directed instruction in favor of the party upon whom rests the burden of proof. *Yarn Mills* v. *Armstrong*, 191 N.C. 125, 131 S.E. 416; *Evans* v. *Ins. Co.*, 213 N.C. 539, 196 S.E. 814; *House* v. *R. R.*, 131 N.C. 103, 42 S.E. 533; *Cox* v. *R. R.*, 123 N.C. 604, 31 S.E. 848."

The laws of North Carolina regard the proper placing of the burden of proof as a substantial right. *Arnold* v. *Trust Co.*, 48 N.C. 433, 67 A.D. 250; *Fisher* v. *Jackson*, 216 N.C. 302, 4 S.E. 2d 847.

In *Cox* v. *R. R.*, 123 N.C. 604, 31 S.E. 848, the Court discussed this problem in the following way, which is the law of North Carolina today:

"It is the settled rule of this Court that a verdict can never be directed in favor of the party upon whom rests the burden of proof, who in all cases is considered to have the affirmative of the issue, whatever may be its form. Though this rule was discussed and reaffirmed in *Spruill* v. *Ins. Co.*, 120 N.C. 141, it did not have its origin in that case, but in *Wittkowski* v. *Wasson*, 71 N.C. 451, where the doctrine was distinctly laid down in the following words quoted from the opinion of Welles, J., in the Court of Exchequer Chamber: 'There is in every case a preliminary question which is one of law, viz: whether there is any evidence on which the jury could properly find the question *for* the party on whom the *burden* of proof lies. If there is not, the Judge ought to withdraw the question from the jury and direct a *nonsuit* if the *onus* is on the *plaintiff*, or direct a *verdict* for the plaintiff if the *onus* is on the *defendant*.' In other words, the verdict must in either event be directed *against* the party on whom

lies the *onus*, and by necessary implication, can never be directed in his favor.

"In *Spruill* v. *Ins. Co.*, supra, on page 147, this Court has said: 'That where there is no evidence, or a mere scintilla of evidence (or the evidence is not sufficient in a just and reasonable view of it to warrant an inference of any fact in issue), the Court should not leave the issue to be passed upon by the jury, but should direct a verdict *against the party upon whom the burden of proof rests.*' The words in brackets have been cited as authorizing the Court below to pass upon the entire evidence, and direct a general verdict in favor of the defendant upon the contributory negligence of the plaintiff. That opinion will bear no such construction, as the burden of proving contributory negligence is always upon the defendant. Therefore, a direction in his favor, based in any degree upon the contributory negligence of the plaintiff, would be a direction *in favor* of the party upon whom rested the burden of proof, which is directly opposed to the uniform current of our decisions. *Hardison* v. *R. R.*, 120 N.C. 492; *Collins* v. *Swanson*, supra; *Bank* v. *School Com.*, 121 N.C. 107; *Eller* v. *Church*, supra; *Caldwell* v. *Wilson*, 121 N.C. 425; *White* v. *R. R.*, ibid., 484; *Everett* v. *Receivers*, ibid., 519; *Cable* v. *R. R.*, 122 N.C. 892; *Johnson* v. *R. R.*, ibid., 955; *Whitley* v. *R. R.*, ibid. 987."

The plaintiff obviously had the burden of proof on the first issue, which read: "Was the damage sustained by the plaintiff caused by the negligence of the defendant?"

It was also error to direct a verdict in favor of the plaintiff where there was a sharp contradiction in the evidence. There were four witnesses who saw the trestle after the truck struck it, but before the train wreck. Three of them inspected the trestle at close range for the express purpose of ascertaining any damage, and found none. The fourth, plaintiff's brakeman, testified that he noticed the bridge two feet out of line as he approached in the train that wrecked.

The Court of Appeals has not only approved the direction of a verdict on the issue of negligence in this case in

favor of the party having the burden of proof, contrary to the law of the State of North Carolina, but it has done so in utter disregard of plenary evidence in the record tending to show (1) that the defendant's truck did no damage to the trestle, and (2) that the conduct of defendant's driver under the circumstances which existed at the time and place in question was that of a reasonably prudent man; and therefore there was an absence of actionable negligence on the part of the defendant.

U.S.C.A., Title 28, Section 725 (now Section 1652), contains the following language:

> "The laws of the several states, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the Courts of the United States, in cases where they apply."

Beginning with *Swift* v. *Tyson*, 16 Pet. 1, 18, 10 L. Ed. 865, 871, the Court held that the foregoing section applied only to statutes of the state, but that a Federal Court sitting in a state was at liberty to investigate and determine the common law for itself. This rule prevailed for many years, until this Court in *Erie Railroad Company* v. *Tompkins*, (1938), 304 U.S. 64, 82 L. Ed. 1188, 114 A.L.R. 1487, reversed the *Swift* v. *Tyson* doctrine and declared that there was no general common law of the Federal Courts, but that the common law of the state should be applied.

The purpose of the Act quoted above, U.S.C.A., Title 28, 725, is to avoid the maintenance within one state of two divergent or conflicting systems of law, one to be applied in state Courts and the other in Federal Courts, in the case of diversity of citizenship. *West* v. *American Telephone & Tel. Co.*, 311 U.S. 223, 61 S. Ct. 179, 85 L. Ed. 139.

And so, it is well settled that a United States District Court, whose jurisdiction is based on diversity of citizenship, must enforce and apply state law and state decisions

when the rights of individuals arising under ordinary circumstances, not calling for the interpretation of Federal laws, are being determined. As to such transactions, there is no Federal common law. Yankwich, J. "Chief Characteristics of Federal Trial Practices in Civil Cases", (1952), 12 F.R.D. 269, p. 308.

For the purposes of diversity jurisdiction, a Federal Court is in effect only another Court of the state. *Guaranty Trust Co.* v. *York,* 326 U.S. 99; 89 L. Ed. 2079, 65 S. Ct. 1464, 160 A.L.R. 1231. *Angel* v. *Bullington,* 330 U.S. 183, 67 S. Ct. 657, 91 L. Ed. 832.

This rule has been applied by this Court in cases involving burden of proof (*Cities Serv. Oil Co.* v. *Dunlap,* 308 U.S. 208, 84 L. Ed. 196, 60 S. Ct. 201; cf. *Stoner* v. *New York L. Ins. Co.,* 311 U.S. 464, 85 L. Ed. 284, 61 S. Ct. 336); contributory negligence (*Palmer* v. *Hoffman,* 318 U.S. 109, 117, 87 L. Ed. 645, 651, 63 S. Ct. 477, 144 A.L.R. 719); conflict of laws (*Klaxon Co.* v. *Stentor Electric Mfg. Co.,* 313 U.S. 487, 85 L. Ed. 1481, 61 S. Ct. 1023, 134 A.L.R. 1462); accrual of the cause of action (*West* v. *American Teleph. & Teleg. Co.,* 311 U.S. 223, 85 L. Ed. 139, 61 S. Ct. 179, 132 A.L.R. 956); res judicata (*Angel* v. *Bullington,* supra); a state law barring foreign corporations from maintaining suit in state Court (*Woods* v. *Interstate Realty Co.,* 1949, 337 U.S. 535, 69 S. Ct. 1235, 93 L. Ed. 1524; and a state statute requiring a plaintiff to give security in a stockholder's derivative suit (*Cohen* v. *Beneficial Loan Corp.,* 1949, 337 U.S. 541, 69 S. Ct. 122).

In the instant case, the Court of Appeals treated the point of directed verdict with the following language: (R. 14; Appendix A, this petition, p. 22)

> "Defendant argues that verdict should not have been directed for plaintiff on this issue because the burden rested upon the plaintiff to establish defendant's negligence. This question was decided on the former appeal, where we said: The fact that the burden of this issue rested upon the plaintiff is imma-

terial; for the rule is well settled that the Court, upon request, should direct a verdict in favor of the party having the burden of proof if the evidence establishes the facts in his favor so clearly that reasonable men could entertain no doubt with regard thereto. (Citing cases). Defendant argues that the state rule is to the contrary; but, that the question is one of Federal and not of state practice, is too well settled to admit of argument, and this was true even in the days of the Conformity Act. See *Nudd* v. *Burrows*, 91 U. S. 426, 442; *Capital Traction Co.* v. *Hof*, 174 U.S. 1, 13-14; *Herron* v. *Southern Pac. R. Co.*, 283 U.S. 91, 94."

It is of paramount importance to note the cases quoted by the United States Court of Appeals in support of its position. It is sufficient to say that all of these cases, *Nudd* v. *Burrows*, 1875, 91 U. S. 426, *Capital Traction Co.* v. *Hof*, 1898, 174 U.S. 1, and *Herron* v. *Southern Pac. R. Co.*, 1930, 283 U.S. 91, pre-date the rule laid down by *Erie R. Co.* v. *Tompkins* (supra). The *Erie* case has shattered the theory propounded by Chief Justice Hughes in *Herron* v. *Southern Pac. R. Co.* (supra) and relied upon by Judge Parker in the Court of Appeals, that Federal Courts and state Courts sit as coordinate tribunals with no common superior in litigation between citizens of different states and that they are free to declare the unwritten law as they respectively deem best.[3] The Federal Rules of Civil Procedure have abrogated most, if not all, of the Conformity Act. For an interesting discussion of the effect of the *Erie* case on *Herron* v. *Southern Pac. R. Co.* (supra), see an article by Professor Edmund P. Morgan "Choice of Law Governing Proof", Harvard Law Rev., Vol. LVIII, No. 2, p. 172, et seq., 1944.

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[3] In *Herron* v. *Southern Pac. R. Co.*, 283 U.S. 91 (1931), Chief Justice Hughes speaking for a unanimous Court said:

"The controlling principle governing the decision of the present question is that state laws cannot alter the essential character

A further distinction, which is not necessary, of the cases cited by the United States Court of Appeals to support its position may be noted in the fact that the *Nudd* case involved a Federal Bankruptcy Act, the jurisdiction in the *Capital Traction* case was based upon an interpretation of an Act of Congress, and in the *Herron* case, the point was whether the Federal District Judge could direct a verdict *for the defendant* in a personal injury action when it appeared as a matter of law that the plaintiff was guilty of contributory negligence (notwithstanding a state constitutional prohibition). In the *Herron* case, the verdict was directed at the close of plaintiff's testimony, thus *against* the plaintiff, and obviously on the first issue. This is in accord with North Carolina decisions which hold at the close of plaintiff's case, when the evidence taken in the light most favorable to the plaintiff is susceptible of but one conclusion that the plaintiff's negligence contributed to his injury, the case must be dismissed as of non-suit.

None of the above cases is hardly in point, had the *Erie* case never been decided.[4]

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or function of a Federal Court. The function of a trial judge in a Federal Court is not in any sense a local matter, and state statutes which interfere with the appropriate performance of that function are not binding upon the Federal Court under either the Conformity Act or the 'Rules of Decision Act'." The *Herron* Case cites the *Nudd* v. *Burrows,* (supra) and *Capital Traction Co.* v. *Hof,* (supra) cases.

[4] It is to be noted that the Supreme Court in the *Erie* Case recognized an article of Judge Parker, "The Federal Jurisdiction and Recent Attacks Upon It" (1932) 18 A.B.A.J. 433, 438 as defending the old *Swift* v. *Tyson* doctrine. *Erie R. Co.* v. *Tompkins,* 82 L. Ed. 1188, p. 1194, Footnote 22.

Judge Parker reviews the situation again in 1949, in "Erie v. Tompkins in Retrospect", American Bar Assoc. Journal, Vol. 35, P. 19 at p. 85, wherein he champions his position with the following: "I do not think, however, that when the point is square-

The last opinion of the Court of Appeals, in this case, quotes from its first opinion and refers to cases reported there without citing them. These cases are listed as follows:

1930 *Gunning* v. *Cooley*, 281 U.S. 90
1912 *Slocum* v. *N. Y. Life Ins. Co.*, 228 U.S. 364
1887 *North Penn R. Co.* v. *Com. Nat. Bank*, 123 U.S. 727
1885 *Marshall* v. *Hubbard*, 117 U.S. 415
1877 *County of Macon* v. *Shores*, 97 U.S. 272, 278
1924 *Angelo* v. *Lamborn*, 4 Cir. 2 F. 2d 855

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ly presented the Supreme Court will ever hold that the Federal Courts must follow state decisions with respect to directing a verdict. Not only would such a holding be directly in the teeth of prior holdings of the Court, but it would violate the principle that the exercise of the judicial function is a matter for Federal Courts themselves. Whether facts constitute a cause of action is a question of local law; but whether, in determining whether such facts have been proven, the judge shall pass upon the question himself on the theory that the evidence is so clear that reasonable men could not doubt what the facts are, or should submit it to the jury for their determination, is so clearly a matter of the exercise of the judicial function as hardly to admit of argument."

The above reasoning employed by Judge Parker for his position is worthy of consideration as it relates to the direction of a verdict *AGAINST* the party having the burden of proof or *AGAINST* the plaintiff. The trial judge in such an instance is utilizing the identical power vested in him to determine whether the facts adduced by the party having the burden of proof are sufficient to be submitted to the jury. In North Carolina, as in other jurisdictions, the action of the trial judge in thus dismissing the plaintiff's case is termed a nonsuit or dismissal under the statute (Hinsdale Act): "The Court does not weigh the evidence, but assumes it to be true in favor of the defeated party." MacIntosh, "North Carolina Practice and Procedure", 1929, p. 633, citing *In Re Will of Margaret Deyton*, 177 N. C. 494, 99 S.E. 424. There is a vast distinction in North Carolina between directing a verdict *against* the party having the burden of proof and directing one *for* the party having the burden. The latter is strictly prohibited, for it is the province of the jury to pass upon the weight of the evidence.

1926 *N. Jacobi Hardware Co.* v. *Vietor,* 4 Cir. 11 F. 2d 30
1928 *Lyon* v. *Travelers Protective Ass'n,* 4 Cir. 25 F. 2d 596, 597
1948 *United States* v. *Grannis,* 4 Cir. 172 F. 2d 507, 513

Again it is to be noted that all are prior to the *Erie* case, with the one exception of *U. S.* v. *Grannis,* 1948, 4 Cir., 172 F. 2d 507. The latter case is irrelevant because it was not a case based on diversity of citizenship, but involved the violation of a Federal criminal statute.

Manifestly Judge Parker cannot bottom his position upon the dichotomy of substance and procedure. "Such abstractions" should be put aside for the "nub of the policy", that the accident of citizenship "should not lead to a substantially different result in a state Court and in a Federal Court." *Guaranty Trust Co.* v. *York,* (supra).

Touching upon the capstone of this petition is an article by Judge Charles E. Clark of the Second Circuit, "State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins", Yale Law Journal, Vol. 55, No. 2, p. 267 (1946). Judge Clark agrees with Professor Morgan that the state law should control in the direction of verdicts. At page 289, he states:

> "But if the burden of proof and presumptions are to be governed by state law in diversity cases, then it rather logically follows that rule as to the direction of a verdict, taking a case from the jury, and even the so carefully cherished right of "comment" on the evidence may be either lost or greatly limited by such law. Though there are cases to the contrary, Professor Morgan in a recent acute article already cited with favor by the Supreme Court, has suggested with considerable force the application of state rules as to discovery of a 'jury question', that is, as to direction of a verdict or nonsuit."[5]

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[5] Professor Morgan's article is the same referred to on page 13. Among the cases to the contrary that Judge Clark cites are two of Judge Parker's Fourth Circuit cases; *Gorham* v. *Mutual*

Summarizing, the reasonings relied upon for allowance of the writ are:

(1) The United States Court of Appeals has decided an important question of a local nature in a way which is in direct conflict with applicable local decisions, in that it has decided that an instructed or directed verdict *in favor* of the party having the burden of proof is permissible in a Federal Court, contrary to the well established law of the decisions of the Supreme Court of the State of North Carolina which hold that such an instruction is forbidden. *McCracken* v. *Clark*, (supra).

Ben. Health & Accident Ass'n of Omaha, 144 F. 2d 97, 99, (1940) Cert. denied 312 U.S. 688 (1941) and *McSweeney* v. *Prudential Ins. Co. of America*, 128 F. 2d 660 (1942) Cert. denied 317 U.S. 658 (1942). Briefs for respondents in opposition to both of these petitions forcefully showed that there was no conflict between the decision of the Court of Appeals and the local state law. Referring to these opinions in footnote 103 of his article, Judge Clark says "This, of course, was the former view. *Herron* v. *Southern Pac. R. Co.* 283 U.S. 91 (1931)". For further treatment of these two cases, see pages 174-175 of Professor Morgan's article (supra) where he states: "There is nothing to show that the attention of the Fourth Circuit was called to the *Stoner* decision. In other Circuits, that decision has been accepted as requiring a Federal District Court to submit an issue to the jury on evidence which would take it to the jury in the Courts of the state in which the Federal Court is sitting." The cases Professor Morgan refers to are: *Laxton* v. *Hatzel and Buehler Inc.*, 142 F. 2d 913 (C.A. 6, 1944) and *Waldron* v. *Aetna Casualty and Surety Co.*, 141 F. 2d 230 (C.A. 3d, 1944).

Also holding that the direction of verdicts should be governed by the substantive law of the State are: *White* v. *State of Maryland*, 106 F. 2d 392, C.A. 4th; *Clay County Cotton* v. *Home Life Ins. Co.*, 113 F. 2d 856 (C.A. 8th, 1940); *Lennig* v. *New York Life Ins. Co.*, 122 F. 2d 871 (C.A. 3d, 1941); *Cooper* v. *Brown*, 126 F. 2d 874 (C.A. 3d 1942); *Detroit Edison Co.* v. *Knowles*, 152 F. 2d 422, (C.A. 6th, 1945); *Gulf, Mobile & Ohio R. Co.* v. *Williamson*, 191 F. 2d 887 (C.A. 8th, 1952).

(2) The United States Court of Appeals has decided, in a diversity of citizenship case, an important question of a local nature in conflict with applicable decisions of this Court. *Erie R. Co.* v. *Tompkins,* (supra), *Angel* v. *Bullington,* (supra), *Guaranty Trust Co.* v. *York,* (supra), *Cities Service Oil Company* v. *Dunlap* (supra), *Palmer* v. *Hoffman* (supra), *Klaxton Company* v. *Stentor Electric Mfg. Co.* (supra), *Woods* v. *Interstate Realty Company* (supra), *Cohen* v. *Beneficial Industrial Loan Corp.,* (supra).

(3) The obvious result of the decision of the United States Court of Appeals is to give a litigant an advantage in the Federal Court, which he would not have in the Courts of the State of North Carolina. A litigant filing suit in a Federal Court may escape local prejudice, but he should not be allowed to take refuge therein from the laws, statutes, decisions and public policy of the state. Since the cause of action relied upon by the plaintiff is created by local law, the measure of it is to be found only in local law. It carries the same burden and is subject to the same defenses in the Federal Court as in the State Court. Where local law qualifies or abridges the rights of litigants, the Federal Court must follow suit. Otherwise, there is a different measure of the cause of action in one Court than in another, and the principle of *Erie R. Co.* v. *Tompkins* (supra) is transgressed. *Ragan* v. *Merchants Transfer & Warehouse Co.,* 337 U.S. 530, 93 L. Ed. 1520, 69 S. Ct. 1233. The result of the decision by the United States Court of Appeals will invite litigants, who have a choice, to bring their action in the Federal Court and thus avoid the reasonable burden placed upon them by the law of the State of North Carolina, which prohibits a directed verdict in favor of the party having the burden of proof. This is clearly a discrimination against citizens of this state in favor of those authorized to invoke the diversity jurisdiction of Federal Courts.

(4) If the decision of the United States Court of Appeals is allowed to stand, mischievous results will develop within this state, and its citizens will be denied the equal protection of the law.

CONCLUSION

For the foregoing reasons, we respectfully submit that this is an appropriate case for the granting of a Writ of Certiorari. The question involved is one of great public importance to the people of the State of North Carolina. There are other states whose public policy forbids the direction of a verdict *in favor* of the party having the burden of proof.[6] The conflict between the opinion of the United States Court of Appeals for the Fourth Circuit and the decision of this Court, commencing with the *Erie* case, and the conflict with the well determined decisions of the Supreme Court of the State of North Carolina culminating in the case of *McCracken* v. *Clark*, (1952), 235 N.C. 186, 69 S.E. 2d 184, will bring about confusion and injustice. We submit that the Writ should be granted as prayed for, and that judgment of the United States Court of Appeals, Fourth Circuit, and the District Judge be reversed.

Respectfully submitted,

MURRAY ALLEN

ARCHIBALD CRAIGE

FRANKLIN T. DUPREE, JR.
Counsel for Petitioner

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[6] *Spence* v. *Bethlehem Steel Co.*, 173 Maryland 539, 197 A. 302, p. 308; *Whitten* v. *City of Haverhill*, 204 Mass. 95, 90 N.E. 409.

APPENDIX "A"

OPINION OF THE COURT

No. 6555

DAVIS FROZEN FOODS, INCORPORATED, *Appellant*

v.

NORFOLK SOUTHERN RAILWAY COMPANY, *Appellee*

Before PARKER, Chief Judge, and SOPER and DOBIE, Circuit Judges

PARKER, Chief Judge:

This is the second appeal in the action brought by the Norfolk Southern Railway Company to recover damages sustained as the result of a truck's colliding with a trestle bridging the underpass of a state highway at Bailey, North Carolina, and dislocating plaintiff's railroad track and thereby causing the wreck of one of its freight trains. On the former appeal we held that there was error in not directing a verdict for plaintiff on the issue as to whether the dislocation of the track was caused by the negligence of the driver of the truck but that there was evidence for the consideration of the jury on issues directed to the contributory negligence of plaintiff in failing to maintain adequate warning signs and in failing to operate its train so as to avoid the wreck. Norfolk Southern Ry. Co. v. Davis Frozen Foods 4 Cir. 195 F. 2d 662. On the new trial had in accordance with our mandate, the trial judge directed a verdict in favor of plaintiff on the issue relating to the negligence of defendant in causing the dislocation of the track, and the jury, in answer to specific issues submitted to them, exonerated the plaintiff of negligence with respect to the maintenance of warning signs and the operation of its train. From a judgment on the verdict, which awarded damages to plaintiff, the defendant has appealed.

Defendant's principal contention is that there was error on the part of the trial court in directing verdict for plaintiff on the issue as to whether the damage sustained by plaintiff was caused by negligence of the defendant. This issue was limited by the trial judge in his charge upon the second trial, just as it was limited in the first, to the question as to whether the dislocation of plaintiff's track was

caused by the negligence of the driver of defendant's truck; and as there was no substantial difference in the evidence bearing upon the issue in the two trials, it was the duty of the judge, in application of the law of the case, to direct a verdict for plaintiff, since we had held that it was error not to direct a verdict for plaintiff, on such evidence in the first trial. Thompson v. Maxwell Land Grant Co. 168 U.S. 451, 456; A. C. L. R. Co. v. Chance 4 Cir. 198 F. 2d 549, cert. den. 344 U.S. 877; Wyant v. U. S. Fidelity & Guaranty Co. 4 Cir. 116 F. 2d 83, cert. den. 314 U. S. 610; Maryland Casualty Co. v. City of South Norfolk 4 Cir. 54 F. 2d 1032, cert. den. 286 U. S. 562; Dodd v. Union Indemnity Co. 4 Cir. 32 F. 2d 512.

Defendant argues that there was a difference in the testimony on the two trials; but we think that there was no substantial difference. The driver of the truck softened somewhat his testimony to the effect that he was not thinking when he ran his truck against the trestle; but he admitted that he was familiar with the underpass and did not "realize" that he was driving a larger truck than he was accustomed to driving until too late to avoid running against the trestle. That such inattention to what he was doing was negligence is too clear for argument. The witness Stone, who did not testify on the first trial, gave evidence that the engine turned over after it had crossed the trestle, and that the cars seemed to go down in a hole; but there was nothing in this to negative the fact that the derailment occurred as established by the evidence on the first trial, and the witness admitted that what he saw might have resulted from the engine and cars getting off the track as they crossed the trestle. The witness Warrenfels testified on the second trial that a sudden change of temperature might cause the buckling of rails, if there was no proper chine left between their ends; but there was no evidence of any sudden change of temperature or anything else, other than the collision of the truck with the trestle, to explain the dislocation of the track.

Defendant relies, as it did on the first appeal, upon the testimony of the driver of the truck and of two other witnesses to the effect that they looked up after the collision and saw nothing wrong with the trestle. None of these witnesses, however, examined the trestle from the top where the tracks were and where the dislocation would have been evident, and all admitted that their examination was of the

most casual nature. Their testimony can hardly be said to constitute a "scintilla" of evidence that the collision did not cause the dislocation of the track which resulted in the wrecking of the train. The evidence establishes that the track was in good condition and that a train passed safely over it about an hour before the collision. The collision was a violent one, as the crumpled condition of the top of the truck establishes beyond peradventure. About an hour later the track was seen to be out of line by a trainman on an approaching train, who leaped from the train for safety to avoid being in the wreck which he saw was inevitable. The track was out of line just as though it had been shoved over by the collision and, although the matter was carefully investigated by both parties, nothing was found except the collision to account for the dislocation. The suggestion that heat expansion may have caused the buckling of the rails is too far fetched for serious consideration. As we pointed out in our former opinion, it is too much of a coincidence that heat buckling should have occurred at the one place on a 300 mile line of railroad where the collision with the truck had just taken place, and this too at 10:30 in the morning. Defendant attempts to argue that the rails may have been relaid without sufficient chine when the bridge was repaired some weeks before; but the evidence is that the rails were not disturbed when the repairs were made. The evidence leaves no ground for reasonable men to differ as to the fact that the collision was due to the negligence of the driver of the truck and that it resulted in knocking the tract out of alignment. Any other conclusion would be entirely without support in the evidence and would be based on conjecture so tenuous that it could not reasonable be indulged. Under such circumstances verdict for the plaintiff on this issue was properly directed.

Defendant argues that verdict should not have been directed for plaintiff on this issue because the burden rested upon the plaintiff to establish defendant's negligence. This question was decided on the former appeal, where we said: "The fact that the burden of this issue rested upon the plaintiff is immaterial; for the rule is well settled that the court, upon request, should direct a verdict in favor of the party having the burden of proof if the evidence establishes the facts in his favor so clearly that reasonable men could entertain no doubt with regard thereto. (Citing cases)." Defendant argues that the state rule is to the contrary; but

that the question is one of federal and not of state practice, is too well settled to admit of argument, and this was true even in the days of the Conformity Act. See Nudd v. Burrows 91 U. S. 426, 442; Capital Traction Co. v. Hof 174 U.S. 1, 13-14; Herron v. Southern Pac. R. Co. 283 U.S. 91, 94.

Defendant argues that verdict should have been directed in its favor on the issue of contributory negligence because of the evidence relating to the inadequacy of the warning signs displayed. There was a conflict in the evidence as to the adequacy of the signs, however, and quite apart from this, the jury might well have found that any negligence with respect thereto could not be held a contributory cause of the collision, since the driver of the truck was thoroughly familiar with the underpass. On the former appeal we held that the question was one for the jury, saying "The crossing above the level of the highway was for the benefit of the railroad as well as of the public; and, if there was danger to the public in its maintenance, the railroad as the owner in charge of the property, the presence of which constituted the danger, was under obligation to see that due warning thereof was given. See Contino v. Baltimore & Annapolis R. Co. 4 Cir. 178 F. 2d 521; Id. 4 Cir. 185 F. 2d 932. Whether the warning sign put up by the Highway Commission and partially obscured by weeds was a sufficient discharge of the duty was a question for the jury, as was also the question as to whether the negligence, if it existed, was a contributory cause of the collision".

There was no error and the judgment appealed from will be affirmed.

Affirmed.

APPENDIX "B"

North Carolina General Statute, 1943 Vol. 1, Section 20-116 (c)

20-116, *Size of Vehicles and loads*

(c) No vehicle unladen or with load shall exceed a height of twelve feet, six inches.

23

FILED
AUG 14 1953
HAROLD B. WILLEY, Clerk

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 178

DAVIS FROZEN FOODS, INC., Petitioner

v.

NORFOLK SOUTHERN RAILWAY COMPANY,
Respondent

RESPONDENT'S BRIEF IN ANSWER TO PETITION AND BRIEF FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ROBERT N. SIMMS
ROBERT N. SIMMS, JR.
JOHN M. SIMMS
of Raleigh, N. C.

Counsel for Respondent

COMMERCIAL PRINTING COMPANY, RALEIGH, N. C.

INDEX

SUBJECT INDEX

	Page
STATEMENT OF THE CASE	1
REASONS FOR NOT GRANTING A WRIT	4
CONCLUSION	13

TABLES OF CASES CITED

Carstarphen v. Carstarphen, 193 N. C. 541, 137 S. E. 658 ---- 5, 6

Davis Frozen Foods, Inc. v. Norfolk Southern Railway Co., C. A. (4 Cir.),____F. 2d____, decided May 28, 1953___ 6

Erie Railroad Co. v. Tompkins, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 ---- 7

Finance Company v. O'Daniel, 237 N. C. 286, 74 S. E. 2d 717 ---- 5

Gorham v. Mutual Benefit Health & Accident Assoc. of Omaha, C. A. (4 Cir.), 114 F. 2d 97, Cert. denied, 312 U. S. 688 ---- 12

Gunning v. Cooley, 281 U. S. 90 ---- 7

In Re Will of Margaret Deyton, 177 N. C. 494, 99 S. E. 524 ---- 11

La Vecchia v. Land Bank, 218 N. C. 34, 9 S. E. 2d 489 ---- 5

McSweeney v. Prudential Ins. Co. of Amer., 128 F. 2d 660 ---- 12

Norfolk Southern Ry. Co. v. Davis Frozen Foods, Inc., C. A. (4 Cir.), 195 F. 2d 662 ---- 6

Wilkerson v. McCarthy, 336 U. S. 53, 69 S. Ct. 413---- 8

STATUTE CITED

Title 28, U. S. C. A., Section 723, new Title 28, Section 2072 ---- 11

RULE CITED

Rule 50, Federal Rules of Civil Procedure ---- 11

BOOK CITED

McIntosh, *North Carolina Practice and Procedure*, (1929) pp. 632, 633 ---- 5, 10, 11

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 178

DAVIS FROZEN FOODS, INC., Petitioner

v.

NORFOLK SOUTHERN RAILWAY COMPANY,
Respondent

RESPONDENT'S BRIEF IN ANSWER TO PETITION AND BRIEF FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

STATEMENT OF THE CASE

In order that the Court might get a clear picture of the facts in this matter, without so many statements of contentions and arguments as contained in the Brief of the Petitioner, we submit the following:

This is a civil action for damages in which there has been a verdict and judgment for the plaintiff for the recovery of damages that were sustained as a result of a truck's colliding with a trestle bridging the underpass of a State highway at Bailey, N. C. and dislocating plaintiff's railroad tracks over said trestle. The owner of the truck, Davis Frozen Foods, Inc. is the defendant in this action. Plaintiff alleges that the collision with the trestle was due to negligent operation of the truck by defendant's driver, and resulted in the wrecking of one of plaintiff's freight trains. The defendant denies negli-

gence in the operation of the truck and pleads contributory negligence on the part of the plaintiff in failing to provide adequate warning signs on the underpass and in operating the train which was wrecked.

The evidence was to the effect that the underpass, which was built by the State Highway Commission beneath plaintiff's tracks, had a clearance of only 9.1 feet. Defendant's truck was 9½ feet high. There was no clearance sign on the trestle over the underpass, but by the side of the road some distance away was a warning sign which the Highway Commission had erected, stating that the clearance was 8½ feet. The driver of the truck testified that he did not see this sign, but he had passed through this underpass before when driving a smaller truck and knew that the clearance was low. He testified that he did not think about being in a larger truck on this occasion until he was right at the underpass and he then put his foot on the brakes just as the top of the truck struck the trestle. On cross examination, he admitted that he simply was not thinking that he was driving the larger truck at the time of this collision with the trestle.

The evidence at the trial was to the effect that the rails across the trestle were fastened to cross ties, which in turn were bolted to steel I beams which rested on timbers supported by piling. The top of the truck struck one of the I beams with force sufficient to cause the crumpling of the metal top of the truck across its entire front. The defendant filed a counterclaim in this action for $1,000.00 for alleged damages to the truck, indicating something of the extent to which the truck was bent up and damaged as a result of colliding with this trestle.

When the wreck occurred, about one hour after the truck had struck the trestle, the trestle, including the I beams and cross ties as well as the rails, was found to be out of line just as though it had been shoved over by the collision of the truck against the trestle. There was no evidence that anything had

occurred in the meantime to throw the track and trestle out of line, and although the matter was carefully investigated by both parties, nothing was found except the collision to account for the dislocation. Buckling of the tracks as a result of heat expansion of the metal rails was contended by the defendant to have been a cause of the difficulty; but the evidence was that the wreck occurred in the morning and there was no evidence of any excessive heat at that time. There was some testimony that the driver of the truck and a couple of local residents glanced around underneath the trestle after the truck struck it and did not notice anything out of the ordinary, but none of them were experts or had any ability to judge about that.

There was evidence by the employees of the railroad that the dislocation of the rails could not have been seen by them for a sufficient distance to have stopped the train and to have avoided the wreck, and that the train was stopped as quickly as it could be after the men on the engine were able to see that the tracks were out of line over the trestle. The engine and a number of cars were derailed at the point of the trestle before the train was stopped. The railroad employees on the engine, when they observed the tracks out of line, threw on the brakes and then leaped from the train to the ground for safety to avoid being in the wreck which they anticipated and thought was inevitable.

Petitioner states in its brief that "the entire underpass had been rebuilt just three weeks before" the truck struck it. However, the evidence was to the effect that the rails had not been changed at that time and only some of the substructure had been re-worked, without disturbing the rails.

In the Petitioner's Brief, on page six, Petitioner undertakes to try to show that the trestle was examined by two disinterested witnesses before the train wreck and after the truck struck it, and that they found nothing wrong. The evidence shows that they only glanced around very briefly from beneath

the trestle and they did not go up where they could see the rails and thus see that they were out of line, as they were observed to be by the men on the train, soon afterwards.

The statement on page six of Petitioner's Brief about the testimony of the plaintiff's witness, its General Superintendent Mr. Kennedy, is misleading, unless the rest of that part of the evidence is also considered. There it is seen that he testified that a man of good judgment concerning bridge construction should have been able to detect the displacement caused by the truck if the man was walking under the trestle and looking up, but Mr. Kennedy qualified that by saying that this would be true *only if the man knew what to look for and what to expect*. The testimony in this case indicates that neither of the alleged witnesses mentioned by the defendant, Petitioner, had any experience in matters of that sort nor did any more than to glance about, casually, from underneath the trestle, as above set forth and as fully covered in the evidence.

REASONS FOR NOT GRANTING A WRIT

I

Petitioner bases its argument in support of its Petition for a Writ of Certiorari solely upon its claims that under the law of the State of North Carolina a verdict may not be directed in favor of the party having the burden of proof. Therefore, if the law of North Carolina is otherwise and permits the direction of a verdict in favor of the party having the burden of proof in a case such as this one before the Court, then there is no merit to the one and only "Question Presented" as set forth on page two of Petitioner's Petition and Brief. Thus it follows that Petitioner's four Specifications of Error as set forth on page seven of its Petition and Brief are groundless. The claim that Petitioner makes about this matter is erroneous if the North Carolina State courts could have directed a verdict in favor of the party having the burden of proof, for then the Court of Appeals has simply

conformed to the law of the State of North Carolina, has done nothing contrary to any decisions of the Supreme Court of the United States, has not discriminated against Petitioner and has properly affirmed the judgment of the District Court.

While it may be said that the general rule in North Carolina is that a verdict may not be directed in favor of the party having the burden of proof, nevertheless there has been and is a well known exception to such general rule *to the effect that if the facts are admitted or established and only one inference can be drawn from them, the Judge may draw the inference and so direct the jury.*

In *La Vecchia vs. Land Bank,* 218 N. C. 34, 9 SE(2) 489 (1940) the trial Court directed a verdict for the plaintiff, defendant excepted to this action by the trial Judge and this matter was squarely before our Court. The Court had the following to say in its unanimous opinion:

> "While it is true as a general principle of law that the trial judge cannot direct a verdict in favor of the party upon whom rests the burden of proof, but 'if the facts are admitted or established, and only one inference can be drawn from them, the Judge may draw the inference and so direct the jury'. *McIntosh, N. C. P. & P. page* 632. In the present case the admissions of defendant virtually cover the facts sought to be elicited by the first, second and third issues. As to the fourth issue, the evidence is all one way and is susceptible of only one inference. In the judgment below we find no error."

The above case has not been overruled or modified and is the law in the State of North Carolina today in such situations. The La Vecchia case has been cited with approval in a unanimous opinion by the Supreme Court of North Carolina on this very principle in the Spring Term, 1953, opinions of the Supreme Court of North Carolina, *Finance Company vs. O'Daniel,* 237 NC 286, 74 S. E. La. 717. See also *Carstarphen*

vs. Carstarphen, 193 NC 541, 137 S. E. 658, wherein the trial court directed the jury to answer the first issue for the plaintiff even though plaintiff had the burden of proof on the first issue. On appeal this action of the trial court was affirmed by the Supreme Court of North Carolina in a unanimous opinion.

On the first appeal, of the case now before this Court, from the District Court to the Court of Appeals for the Fourth Circuit, the Court of Appeals specifically held that on the evidence relating to the first issue "reasonable men could not differ as to his (the truck driver's) negligence in running into the trestle . . . Likewise, we think that reasonable men could not differ as to the fact that the collision was the cause of the dislocation of the tracks." *Norfolk Southern Railway Company vs. Davis Frozen Foods, Inc.,* CA (4 Cir.), 195 F2d 622. The Circuit Court reversed the judgment of the District Court on the first appeal and remanded the case for a new trial.

At the second trial of this case in the District Court and after all the evidence of plaintiff and defendant had been presented, the District Judge directed the jury to answer in favor of the plaintiff the first issue (which was the same as the first issue on the first trial). Obviously, the District Judge at the second trial was of the opinion that only one inference could be drawn from the evidence relating to the first issue and that reasonable men could not differ as to the significance of this evidence and that a directed verdict on such issue was proper. On the second appeal of the case at bar to the Court of Appeals for the Fourth Circuit, the Circuit Court holds that there was no substantial difference in the evidence bearing upon the first issue at the second trial and the court goes on to uphold the action of the District Judge in directing a verdict for the plaintiff on the first issue. *Davis Frozen Foods, Inc. v. Norfolk Southern Railway Co.,* CA (4Cir.) ____F. 2d____, decided May 28, 1953.

Thus we see that *three times* now in this case it has been held that on the evidence relating to the first issue reasonable men could not differ as to the significance of the evidence, and this being so, plaintiff would have been entitled under the law of the State of North Carolina to a directed verdict on the first issue if the case had been heard in the State Courts, (*La Vecchia vs. Land Bank, supra*), just as it was likewise entitled to the same in the Federal Courts.

For these reasons Respondent respectfully submits that this is not an appropriate case for the granting of a Writ of Certiorari as the Federal Courts have dealt with the plaintiff and the defendant in this case just as the courts of the State of North Carolina would have done.

II

Since, as we have shown, the District Court and the Court of Appeals have applied the same law as would the State Courts of North Carolina in their rulings in the case at bar, we submit that the lengthy argument and extensive citation by the Petitioner of cases concerning the law in the case of *Erie Railroad Company vs. Tompkins,* (1938) 304 US 64, 82 L.Ed. 1188 as related to the actions of the Circuit Court in this matter, have no pertinency and no merit here.

III

We would point out to the Court that Petitioner is in a curious position in presently attempting to raise a question concerning the right of the Federal Courts to direct a verdict in favor of the party having the burden of proof. In its brief filed in the Court of Appeals on the first appeal of this case, the present Petitioner took the position that the case being reviewed by the Circuit Court was not a case in which reasonable men could not differ as to the effect of the evidence on the first issue, and cited the case which they now seek to repudiate, *Gunning vs. Cooley,* 281 U.S. 90, (P. 7 of said

Brief). And, in this Petitioner's Brief filed with the Circuit Court on the second appeal, this Petitioner argued in its point No. V (pp. 45-9 of said brief) that the District Court erred in not directing a verdict for the defendant (the Petitioner here) on the second issue which dealt with contributory negligence and as to which there can surely be no question but that the defendant (the Petitioner here) had the burden of proof. Thus it appears that Petitioner is trying to blow both hot and cold and is now only grabbing at straws in its effort to delay the execution of justice.

We call further to the attention of the Court that in this Petitioner's Petition to Rehear filed after this case was first decided by the Court of Appeals for the Fourth Circuit, this Petitioner did not take exception to the Court of Appeals' holding that a directed verdict is permissible in favor of the party having the burden of proof if the evidence establishes the facts in his favor so clearly that reasonable men could entertain no doubt with respect thereto. This Petitioner in that Petition to Rehear took the Court of Appeals to task for allegedly not considering all of the evidence adduced in the trial of this case relating to the first issue.

In that Petition for Rehearing filed by this Petitioner, Petitioner's complaint was stated as follows:

> "We respectfully submit that this and other evidence to which we have called the attention of this Court makes inapplicable the rule stated in the opinion that the Court should, upon request, direct a verdict in favor of the party having the burden of proof if the evidence establishes the facts in his favor so clearly that reasonable men could entertain no doubt with regard thereto, and brings into full force and effect the rule reiterated by the United States Supreme Court as recently as January 31, 1949, in *Wilkerson v. McCarthy*, 336 *U. S.* 53, 69 *S. Ct.* 413, that: 'Peremptory instructions should not be given in negligence cases "where the facts are in dispute and the

evidence in relation to them is that from which fair-minded men may draw different inferences." ' " (Page 15 of Petition for Rehearing by appellee filed April 30, 1952, with the Clerk of the United States Court of Appeals for the Fourth Circuit).

From this it is clear that this Petitioner took no issue with the Court of Appeals as to the right of the Federal Court to direct a verdict against the party having the burden of proof in a Federal Court trial in North Carolina. Indeed, this petitioner at that time recognized the right of the Federal Court to so direct a verdict but simply contended that the evidence in this case was such that this case was not a proper case for such a direction.

The Petition to Rehear was denied and this Petitioner took no appeal from the decision or from the denial of its Petition to Rehear. It *should be* and we submit it *is* now too late for Petitioner to seek to attack that ruling when it had every opportunity to appeal at that time. The Petitioner here is seeking to pursue a course which has always been condemned as "trying to take two bites at a cherry". It is well established that the first opinion of the Circuit Court (holding that the District Court should direct a verdict), from which Petitioner did not appeal, thus became the "law of the case" and cannot now be reopened or this question raised anew. If Petitioner desired to raise this question, it should have been done by an appeal from the opinion of the Circuit Court and not at this late date.

IV

One of the principal contentions of the Petitioner is the fact that the trial Court was obliged to follow the rules Petitioner contends exist in North Carolina Courts as to the direction of a verdict. Respondent does not for a moment concede the correctness of this contention in any respect. On the contrary the respondent says that the Federal rule clearly

applies as set forth by the Court of Appeals in both of its two opinions.

In this connection we wish to point out that the Chief Judge of the Court of Appeals, who wrote the opinion on each of the appeals, is a life-long and very able and learned North Carolina lawyer and is well versed in the rules in North Carolina courts from his many years of practice in that State, and he is likewise perfectly familiar with the Federal rules due to his long tenure of office on the Federal Court benches. Therefore, he is in an excellent position to pass upon the very question raised here and which was raised in the Court of Appeals by the Petitioner. On pages 14 and 15 of the Brief of the Petitioner (in the footnotes), there appears a reference to articles by this learned Chief Judge, Honorable John J. Parker. Among other things he is there quoted as having stated in one of the articles, the following:

> "Whether facts constitute a cause of action is a question of local law; but whether, in determining whether such facts have been proven, *the Judge shall pass upon* the question himself, on the theory that evidence is so clear that reasonable men could not doubt what the facts are, or should submit it to the jury for their determination, is so clearly a matter of the *exercise of the judicial function* as hardly to admit of argument." (Emphasis added.)

The trial judge in such an instance is utilizing similar power to that vested in him to determine whether the facts adduced by the party having the burden of proof are sufficient to be submitted to the jury. In North Carolina, as in some other jurisdictions, the action of the trial judge in thus dismissing the plaintiff's case is termed a nonsuit, or dismissal under the statute (Hinsdale Act): "The Court does not weigh the evidence, but assumes it to be true in favor of the defeated party." McIntosh, "North Carolina Practice and Procedure,"

1929, p. 633, citing *In Re Will of Margaret Deyton,* 177 N.C. 494, 99 S.E. 424.

In the case now at bar, the Trial Judge, in directing the verdict on the first issue, did not *weigh* the evidence, but simply *exercised his proper judicial function* in finding that the evidence was all one way and that "reasonable men could not differ" as to the effect of it (as the Circuit Court opinion so well stated it); and therefore the only proper action was a directed verdict, there being nothing to be *weighed* or passed upon by a jury.

A motion for a directed verdict is governed by *Rule 50 of the Federal Rules of Civil Procedure.* This rule of procedure contains no prohibition against the directing of a verdict in favor of the party having the burden of proof.

It is to be borne in mind that Rule 50 of the present Federal Rules of Civil Procedure was prescribed by the Supreme Court after the *Erie Railroad case* cited by the Petitioner had been decided. The Federal Rules of Civil Procedure were prescribed by authority of an Act of Congress enacted in 1934, Title 28, USCA section 723, new Title 28, section 2072. The Statute which gave the Supreme Court the power to prescribe by general rule the practice and procedure of District Courts also states that all laws in conflict with the rules shall be of no further effect.

Apparently, the gist of Petitioner's argument is that in directing the jury to answer the first issue in the affirmative, the Court failed to apply the laws of North Carolina, and, therefore, the decision of our Circuit Court of Appeals is in conflict with the decision of the Supreme Court of the United States in *Erie Railroad Company vs. Tompkins.* In support of this position, Petitioner states that the laws of North Carolina (as Petitioner contends) hold that a directed verdict in favor of the party having the burden of proof is forbidden. As we have already shown in this Brief, that is not necessarily correct. Also, according to Petitioner's argument, the law of North Carolina regards the proper placing of the burden of

proof as a substantive right. Petitioner takes issue with Judge Parker's opinion, in which the Judge states that the question is one of Federal and not of State practice and Petitioner calls attention to the fact that the cases as cited by Judge Parker pre-date *Erie Railroad vs. Tompkins.*

However, in the *Erie Railroad case,* the facts were that plaintiff while walking down a path on the railroad's property, was injured by a train. The question was, whether the laws of Pennsylvania (where the accident occurred), as to the duty owed a person in this position, should be applied in the Federal Court. This case holds that the substantive law of the State must be applied by the Federal Court. However, the question involved in our case is clearly one of *procedure* and *not* of *substantive* law.

We direct attention to the case of *Gorham vs. Mutual Benefit Health & Accident Association of Omaha,* 114 Fed. 2d 97. It was a diversity case from the Eastern District of North Carolina and there the Court of Appeals (Judge Parker writing the opinion) squarely held that the direction of a verdict by the District Judge in favor of the party having the burden of proof was correct and proper, and further held that irrespective of what might be North Carolina's State Court decisions as to the direction of verdicts, in the Federal Courts this is a matter which is governed by Federal procedure and not one wherein local law or local decisions are binding. In that case the *petition for a Writ of Certiorari was denied* by the Supreme Court of the United States, 312 U. S. 688 (1941).

Also the case of *McSweeney vs. Prudential Insurance Company of America,* 128 Fed. 2d 660 (1942) was from the Fourth Circuit Court of Appeals and was a South Carolina case from the Eastern District Court of that state. In that case the Court of Appeals (through Judge Parker, again) squarely holds the same as in the *Gorham case* (*supra*) on the question of directing a verdict in favor of the party having the burden of proof, and cites the *Gorham case* (*supra*). Here

again the *petition for a Writ of Certiorari was denied* by the Supreme Court of the United States, 317 US 658 (1942).

Both the *Gorham case,* (*supra*) and the *McSweeney case* (*supra*) are subsequent to the case of *Erie vs. Tompkins* relied upon by the Petitioner.

It seems to us that these two cases, among others, clearly show the fallacy of the position of the Petitioner and indicate beyond doubt that the petition for a writ of certiorari in this case should be denied as was done in those cases. The plaintiff Railroad in the case now before this Court has already been too long delayed in collecting what money it can from the defendant and it appears that the defendant (here the Petitioner) is simply seeking to wear out this lawsuit by every possible technicality, and we most earnestly submit that the Supreme Court of the United States should not and will not lend its aid to this effort.

CONCLUSION

For all of the foregoing reasons, the Respondent respectfully submits and urges that this Petition for a Writ of Certiorari should be denied. As the District Court and the Court of Appeals have treated this case in exactly the same manner as the Courts of the State of North Carolina would have treated it, there is no question of public importance to the people of the State of North Carolina involved in this Petition, and the opinions of the Court of Appeals for the Fourth Circuit in this case are in no way in conflict with the decisions of this Court or of the Supreme Court of the State of North Carolina, and no confusion or injustice will result from the denial of this Petition for a Writ of Certiorari. On the contrary, defendant (the Petitioner here) has had every proper consideration, a fair and proper trial, and a result has been reached which is manifestly right and just; and the enforcement of the judgment of the District Court as affirmed by the Court of Appeals should not be longer delayed. Ac-

cordingly, Respondent prays that this Petition be denied and that the judgments of the United States Court of Appeals for the Fourth Circuit and the District Judge be undisturbed.

Respectfully submitted,

ROBERT N. SIMMS
ROBERT N. SIMMS, JR.
JOHN M. SIMMS
of Raleigh, N. C.

Counsel for Respondent

24

FILED
SEP 2 1953
HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 178

DAVIS FROZEN FOODS, INC., *Petitioner*

v.

NORFOLK SOUTHERN RAILWAY COMPANY, *Respondent*

PETITIONER'S REPLY BRIEF

MURRAY ALLEN
ARCHIBALD CRAIGE
FRANKLIN T. DUPREE, JR.
Counsel for Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

CASES CITED

	Page
American Construction Co. v. *Jacksonville T.* v. *K. W. R. Co.*, 148 U.S. 372, 37 L. Ed. 486	5
Carstarphen v. *Carstarphen*, 193 N.C. 541, 137 S.E. 658	4
Finance Co. v. *O'Daniel*, 237 N.C. 286, 74 S.E. 717	3
Gorham v. *Mutual Benefit Health & Accident Association of Omaha*, 114 Fed. 2d 97	5
LaVecchia v. *Land Bank*, 218 N.C. 35, 9 S.E. (2) 489 ..	3
McSweeney v. *Prudential Insurance Co. of America*, 128 Fed. 2d 660	5

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DAVIS FROZEN FOODS, INC., *Petitioner*

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NORFOLK SOUTHERN RAILWAY COMPANY, *Respondent*

REPLY BRIEF OF PETITIONER TO BRIEF OF RESPONDENT IN PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Davis Frozen Foods, Inc., a North Carolina corporation, having filed a petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit, now replies to brief of respondent, Norfolk Southern Railway Company.

I.

The question presented in the petitioner's brief is whether the United States Court of Appeals erred in affirming a directed verdict in favor of the plaintiff, who had the burden of proof, when the laws of the State of North Carolina strictly prohibit such a direction.

Respondent, while recognizing the rule in North Carolina, cites three cases in support of its position that there is an exception and that is, "if the facts are admitted or established and only one inference can be drawn from them, the judge may draw the inference and so direct the jury". Next, respondent states that this case comes within the above exception, hence no conflict between the holding of the Court of Appeals and the laws of North Carolina.

Petitioner stressfully urges that this is not the situation. The petitioner, Davis Frozen Foods, Inc., never admitted its liability, forcefully contested the issues throughout, and produced evidence in sharp conflict with that adduced by the respondent. The theory of the case [illegible]espondent, Norfolk Southern Railway Company, was [illegible]etitioner's truck negligently struck the top of a low [illegible] such damage to the railway trestle that train wreck some hours later. To refute petitioner developed the testimony of three [illegible] inspected, from a distance of two or three feet, the tr[illegible] and bridge *before the train wreck*, and who swore [illegible] served no damage to the trestle (Petitioner's bri[illegible] They further testified that they made their inspe[illegible] the express purpose of ascertaining if any damage [illegible] caused by the truck striking the trestle. The last [illegible] to observe the trestle before the train wreck was r[illegible] ent's train brakeman in the approaching train, wh[illegible] fied that he observed, from a distance of 400 feet awa[illegible] bridge or trestle (not just the tracks) out of line two [illegible] Under no circumstances can respondent now say that [illegible] tioner admitted the damage to the trestle, or that there [illegible] not a sharp conflict of evidence.

Nor can the respondent bring the case within the e[illegible] ception on the ground that "only one inference can b[illegible] drawn". This case was tried twice. The United State Court of Appeals, in its second opinion, stated there was no substantial difference in the evidence bearing upon the first issue (Respondent's brief, p. 6). But note carefully

that the jury awarded a verdict for the defendant upon the first trial on the first issue, which was upheld by the Trial Judge. How is it now possible to say that "only one inference can be drawn" from the evidence?

Furthermore, the North Carolina cases relied upon by respondent in support of its exception to the general rule of the Supreme Court of North Carolina prohibiting directed verdicts in favor of parties having the burden of proof are not in point to the facts of this case.

In *LaVecchia* v. *Land Bank*, 218 N.C. 35, 9 S.E. (2) 489, the plaintiff brought suit against defendant to recover funds fraudulently delivered to defendant-payee in violation of the statute pertaining to certain fiduciary responsibilities and obligations. The defendant admitted two of the statutory violations in his pleadings. *The defendant's evidence*, consequently there was no contradiction of plaintiff's evidence to the third issue. Under the circumstances, the evidence was found to be all one way and susceptible of only one inference. To say that the law applied to the facts in that case is applicable to the case at bar is farfetched and misleading. Nothing is admitted here, the evidence is conflicting, and different inferences could be and have been drawn. How else can be explained that at the first trial, a jury of twelve reasonable men found for the petitioner, and that upon a subsequent hearing, the Trial Judge refused to allow the motion of respondent to set their verdict aside? Respondent, on page 7 of its brief, states that "three times now in this case it has been held that reasonable men could not differ as to the significance of the evidence . . .", but respondent overlooks the first two times when reasonable men found otherwise.

The respondent cites the North Carolina case of *Finance Co.* v. *O'Daniel*, 237 N.C. 286, 74 S.E. 717, to support its position. This case is of no help to the respondent for there the Court held, on page 291, "as different inferences can be drawn from the evidence, it was prejudicial error for the Court to give a peremptory charge . . .", and the case was remanded for a new trial!

The last North Carolina case cited by respondent is *Carstarphen* v. *Carstarphen,* 193 N.C. 541, 137 S.E. 658. This was an ejectment proceeding, wherein the Court instructed the jury to find that the plaintiff was entitled to possession of a tract of land, for which he was suing, when the uncontradicted evidence of a deed produced *by the defendant* showed title in the plaintiff. The Court concluded as follows:

> "The next vice in the charge complained of by the defendants is that the verdict is a directed one, and this cannot be done when the burden of proof was on plaintiff; it was an issue of fact for the jury, and not for the Court to determine, citing *Cox* v. *R. R.*, 123 N.C. 611; *Bank* v. *School Committee*, 121 N.C. 109. Conceding this contention is correct, *yet the defendants' evidence,* by every reasonable interpretation, and that unobjected to introduced on the part of plaintiff, all show that the title to the "Sykes Old Store Place" was in plaintiff."

Here again we have a case where there was no conflict in the evidence, and a situation where the defendant proved himself out of Court by his own evidence. To say that in the instant case the petitioner did likewise is a gross misinterpretation of the facts.

It is to be noted that the last opinion of the United States Circuit Court of Appeals in the instant case did not concern itself with any exception, presented now by the respondent for the first time, to the North Carolina rule prohibiting the direction of verdicts in favor of the party having the burden of proof. Chief Judge Parker summarily dismisses the conflict by saying "the question is one of Federal and not state practice." (Petitioner's brief, page 23). This is the error that will bring mischievous results in this state.

II.

Respondent, in paragraph III of its brief, page 7, ignores the fact that this petitioner was awarded a verdict in the first trial which the Trial Judge refused to set aside. On

respondent's appeal, petitioner contended, as it does now, that the first issue was for the jury.

III.

Respondent argues, page 9 of its brief, that it is now too late to appeal and that appeal should have been taken after the United States Court of Appeals reversed the District Court in the first case, and remanded for new trial. It is sufficient to say that such an appeal at that time would have been premature. The judgment was not final, for the case was remanded for a new trial. *American Contruction Co.* v. *Jacksonville, T. & K. W. R. Co.*, 148 U.S. 372, 37 L. Ed. 486.

IV.

The respondent very ably, on pages 12 and 13 of its brief, points out the confusion that now exists as a result of the decisions of Chief Judge Parker of the Fourth Circuit in *Gorham* v *Mutual Benefit Health & Accident Association of Omaha*, 114 Fed. 2d 97, and *McSweeney* v. *Prudential Insurance Co. of America*, 128 Fed. 2d 660, (neither of which are cited by Chief Judge Parker in his opinion in this case), which declare that state law does not control Federal Courts in the direction of verdicts. The laws of North Carolina prohibit a directed verdict in favor of party having the burden of proof. If the matter is left to stand, the doctrine of the *Erie* Case was for nought, and litigants in this state will be plagued by two methods of justice.

WHEREFORE, petitioner respectfully prays that this Writ be granted and that the judgment of the United States Court of Appeals and the District Judge be reversed.

Respectfully submitted,

MURRAY ALLEN
ARCHIBALD CRAIGE
FRANKLIN T. DUPREE, JR.
Counsel for Petitioner